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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-664

VENTURA COUNTY,

Appellant,

vs.

GULF OIL CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae in Support of Statement as to Jurisdiction.

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SUBJECT INDEX

Page

Questions Presented 1

Interest of Amici Curiae 1

The Questions Are Substantial 4

I

Ventura County Has Authority to Enforce Its Zoning Ordinance in Los Padres National Forest and Such Ordinance Is Consistent With Federal Environmental Policies 4

II

In Determining Whether the Local Zoning Ordinance Has Been Preempted, the Intent to Preempt Is Not to Be Implied Absent Actual Conflict 8

Conclusion 16

TABLE OF AUTHORITIES CITED

Cases — Page

A. M. Motors Sales v. Div. of Motor Vehicles, etc. (1979) 592 F.2d 219 9

Askew v. American Waterways Operators, Inc. (1973) 411 U.S. 325 14

Chicago-Midwest Meat Ass'n. v. City of Evanston (1978) 589 F.2d 278 9

Florida Lime & Avocado Growers, Inc. v. Paul (1963) 373 U.S. 132 [83 S.Ct. 1210, 10 L.Ed. 2d 248 9

Guss v. Utah Labor Relations Board (1957) 353 U.S. 1 [77 S.Ct. 598, 1 L.Ed.2d 601] 9

Hines v. Davidowitz (1941) 312 U.S. 52 [61 S.Ct. 399, 85 L.Ed. 581] 9

Huron Cement Co. v. Detroit (1960) 362 U.S. 440 12

Jones v. Rath Packing Co. (1977) 430 U.S. 519 [97 S.Ct. 1305, 51 L.Ed.2d 604] 14

Kleppe v. New Mexico (1976) 426 U.S. 529 ..... 3, 5, 15, 16

New York Dept. of Social Services v. Dublino (1973) 413 U.S. 405 [93 S.Ct. 2507] 10, 11, 12, 13

Omaechevarria v. Idaho (1918) 246 U.S. 343 [38 S.Ct. 323, 62 L.Ed. 763] 5

Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218 [67 S.Ct. 1146, 91 L.Ed. 1447] 9

Page

San Diego Unions v. Garmon (1959) 359 U.S. 236 [79 S.Ct. 773, 3 L.Ed.2d 775] 9

United States v. Bateman (9th Cir. 1888) 34 Fed. 86 5

Federal Register

1 Federal Register 2471 (1936) 4

Miscellaneous

General Services Administration, Inventory Report on Jurisdictional Status of Federal Areas Within the States as of June 30, 1962 4

Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II, a Text of the Law of Legislative Jurisdiction, Government Printing Office, 1957, pp. 10-11 ..... 4, 5, 6

Legislative Jurisdiction Over Federal Lands Within the States as of June 30, 1957, p. 111 4

One-third of the Nation's Land—A Report to the President and to the Congress, Public Land Law Review Commission (1970) pp. 324, 327-330 2

Public Land Statistics, 1975, Department of Interior 2

Regulations

Code of Federal Regulations, Title 30, Part. 221 8

Code of Federal Regulations, Title 43, Part. 3100.. 8

Statutes	Page
30 Statutes 1767 (1898)	4
31 Statutes 1954 (1899)	4
33 Statutes 2327 (1903)	4
United States Code, Title 16, Sec. 480	3, 5, 7
United States Code, Title 16, Secs. 1331-1340	16
United States Code, Title 30, Secs. 181-236	1
United States Code, Title 30, Sec. 187	6, 7
United States Code, Title 30, Sec. 189	6, 7

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QUESTIONS PRESENTED.

1. Whether a private entrepreneur operating on federal forest land pursuant to a federal lease is exempt from local regulation under a county zoning ordinance.

2. Whether Congress can preempt and has preempted local governments' historic zoning power over federally owned lands within their boundaries through the enactment of the Mineral Lands Leasing Act of 1920, 30 U.S.C. section 181-236.

INTEREST OF AMICI CURIAE.

The importance of the questions presented to this Court is attested to by the fact that the states of Idaho, Montana, Nevada, Utah and Wyoming have joined in California's decision to file an amicus brief in support of appellant Ventura County.

According to statistics, the federal government owns approximately more than 700 million acres of land in the Western states.[1] The State of California alone has within its boundaries eighteen national forests. In the States of California, Montana, Wyoming, Colorado, New Mexico, Arizona, Washington and Oregon the percentage of federally owned lands is between 25%-60%.[2] In the States of Idaho, Nevada and Utah the federal government owns more than 60% of the land. In Nevada alone the federal government owns 87% of the land.[3]

These lands contain large deposits of uranium, heavy crude oil, mountains of oil shale and a major portion of the country's low-sulfur coal reserves. The federal government through a number of energy programs has set upon a rapid acceleration of development of these bountiful reserves.

The adverse impacts resulting from development of these reserves will be borne almost exclusively by these local and state governments and their constituents. The impacts of rapid acceleration of resource development tend to remain localized and can be substantial. Oil exploration and development operations can create excessive noise, produce unwholesome and noxious odors, contaminate waters in natural channels and result in other conditions which threaten life, health and property. In addition, rapid acceleration of oil exploration and development may result in rapid population

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[1]One-third of the Nation's Land—A Report to the President and to the Congress, Public Land Law Review Commission (1970) pp. 324, 327-330.

[2]Public Land Statistics, 1975, Department of Interior.

[3]*Id.*

increases with its attendant problems and an overburdening of municipal services.

Thus, amici curiae have a substantial interest in the issue of local governments' regulation over federal lands located within their jurisdictions and urge this Court to clarify the authority of a local government to regulate oil exploration and extraction activities on federal forest lands.

The court below declared invalid Ventura County's zoning ordinance as applied to oil exploration and extraction activities of a federal lessee operating on federal forest land. The court declared the zoning ordinance invalid on preemption grounds characterizing the ordinance as a veto power and reasoning that such power impermissibly conflicted with federal goals and purposes. A proper development of the law requires that the questions posed by this case be answered. They are questions of first impression.

If the decision of the court below is permitted to stand, local governments will be precluded from regulating mineral exploration and extraction activities on federally owned lands within their jurisdiction. This result will be contrary to the legislative intent and legislative provisions of the Mineral Leasing Act of 1920, *supra*, and forest legislation acknowledging state jurisdiction upon national forests, 16 U.S.C. section 480.

Further, the court below has erroneously extended this Court's decision in *Kleppe v. New Mexico* (1976) 426 U.S. 529, to substantially different facts presented in the case at bar. These issues will be treated fully in the arguments that follow.

THE QUESTIONS ARE SUBSTANTIAL.

I

Ventura County Has Authority to Enforce Its Zoning Ordinance in Los Padres National Forest and Such Ordinance Is Consistent With Federal Environmental Policies.

Ventura County seeks to regulate Gulf Oil's exploration and extraction operations for oil in Los Padres National Forest through a local zoning ordinance designed to protect the health, welfare, and quality of environment for its residents. The zoning ordinance contains eleven requirements including provisions relating to soundproofing, waste disposal and discharge into streams.

The area comprising Los Padres National Forest was set aside as a national forest by Presidential Proclamations in 1898, 1899 and 1903. (30 Stat. 1767 (1898); 31 Stat. 1954 (1899); 33 Stat. 2327 (1903).) On December 3, 1936, President Franklin D. Roosevelt, by executive order, named the area Los Padres National Forest. (1 Fed.Reg. 2471 (1936). As a result of these Presidential Proclamations, Los Padres National Forest was reserved from entry or settlement and set aside as a public reservation.

Los Padres National Forest is held by the federal government in proprietorial status.[4] Lands in proprietorial status are lands in which the federal government has "acquired some right or title to an area in a state, but has not obtained any measure of the State's authority over the area."[5]

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[4]*Legislative Jurisdiction Over Federal Lands Within the States as of June 30, 1957,* at p. 111, General Services Administration, *Inventory Report on Jurisdictional Status of Federal Areas Within the States as of June 30, 1962.*

[5]*Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction*

Thus, federal ownership of the land alone does not preclude the application of local and state laws.

> "In an area owned by the Federal Government where there has been no cession of legislative jurisdiction on the part of the State government, all State Laws are applicable within the Federal area. Persons present on such land are subject to all State laws."[6]

The Court has more recently recognized in *Kleppe v. New Mexico* (1976) 426 U.S. 529, that in the absence of consent or cession a state retains jurisdiction over federal lands within its territory subject to Congressional power to legislate with respect to such property.

Additional authority acknowledging local jurisdiction is contained in legislation governing the creation of national forests:

> "The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as punishment of offenses against the United States therein is concerned; *the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction,* nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State." (16 U.S.C. § 480.) (Emphasis added.)

Over Federal Areas Within the States, Part II, a Text of the Law of Legislative Jurisdiction, Government Printing Office, 1957 at pp. 10-11; *United States v. Bateman,* (9th Cir. 1888) 34 Fed. 86, 89.

[6]*Id.* at p. 28. Also see *Omaechevarria v. Idaho* (1918) 246 U.S. 343 [38 S.Ct. 323, 62 L.Ed. 763].

Further, under 30 U.S.C. sections 187 and 189 Congress has expressly preserved the right of states and local governments to regulate with respect to certain matters. With respect to leases issued by the Secretary of the Interior Congress specifically provided in section 187 that

> "[n]one of such provisions shall be in conflict with the laws of the State in which the leased property is situated."

The provisions in section 189 delegate to the Secretary broad authority to prescribe rules and regulations and also contain the following savings clause:

> "Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

The court below reasoned that since these sections do not expressly authorize Ventura County to exercise land use powers, there is no grant of concurrent local jurisdiction. This analysis, however, ignores the status of Los Padres National Forest as a proprietary interest of the federal government. As previously mentioned, the federal government holds Los Padres in a proprietary capacity and as such acquired rights and title to the area, but it has not obtained any measure of the State's authority over the area.[7]

Thus the State retains all its legislative jurisdiction over the land, "subject to non-interference by the State

[7] *Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, supra.*

with Federal functions, and subject to the free exercise of the Federal Government of rights with respect to the use, protection and disposition of its property."[8]

The provisions of 30 U.S.C. sections 187 and 189 reinforce the rights of the States and local governments with respect to the express authority contained therein. These provisions cannot be construed so as to limit the rights of Ventura County to regulate solely the activities mentioned in sections 187 and 189. Indeed through the provisions in sections 187, 189 and 16 U.S.C. 480, Congress has clearly expressed its intent not to exclude non-federal legislation.

The Court of Appeals construed the zoning ordinances as a veto power and reasoned that the ordinance frustrated federal policy as set forth in the Mineral Leasing Act. However, as will be discussed in the next section, there is no evidence in the record to support such construction of the ordinance. Setting aside for the present the characterization of the ordiance as a veto power, the question is whether the ordinance frustrates a federal goal or policy under the Mineral Leasing Act of 1920. The Mineral Leasing Act of 1920 reflects a federal policy of encouraging domestic oil production. Notwithstanding this policy, there is no indication from Congress that this goal is paramount to other federal goals and policies. Indeed, by placing federal environmental protection measures upon oil operations under the Mineral Leasing Act, Congress has clearly identified another federal

[8] *Id.*, p. 45.

goal—requiring oil operations to comply with federal environmental protection measures such that our national forests are protected from destruction and degradation.[9] Since Congress has clearly expressed a policy of requiring oil operations under the Mineral Leasing Act to comply with federal environmental protection measures, does it follow that complementary local measures designed to further the same policy are preempted?

Amici submit that the zoning ordinance is consistent with federal policy on environmental protection measures for oil exploration and development under the Mineral Leasing Act of 1920 and, thus, the ordinance does not impermissibly frustrate federal goals encouraging energy development. We now turn to the question of whether the ordinance is otherwise preempted.

II

In Determining Whether the Local Zoning Ordinance Has Been Preempted, the Intent to Preempt Is Not to Be Implied Absent Actual Conflict.

The decision by the Court of Appeals to invalidate the zoning ordinance on the basis of preemption apparently rests on two grounds: first, that the existence of extensive federal regulations in the field impliedly has preempted the local ordinance, and second, that the requirement for a conditional use permit under the zoning ordinance constitutes a veto power of the federal government's decision to issue a lease and thus operates as an impediment to the accomplishment of a federal purpose or policy.

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[9]43 C.F.R., Part 3100, 30 C.F.R., Part 221.

It is generally said that courts will invalidate a local law on preemption grounds only where it is clear that Congress intended to occupy that specific area of local legislation.[10] This intent, however, need not be explicit. It may be inferred from a variety of factors. A number of tests for preemption have developed.

One test is whether the federal regulatory scheme may be so pervasive as to indicate that Congress intended to occupy the entire field leaving no room for state or local governments to act.[11] A second test is whether the federal legislation touches upon a field in which the overriding federal interest is so dominant that the federal statute may be presumed to preclude enforcement of non-federal law on the same subject matter.[12] A third standard is that if the non-federal law stands as an obstacle to or frustrates the accomplishments of the purposes and objectives of Congress, then the non-federal law is preempted by federal law.[13]

These tests notwithstanding, direct, irreconcilable conflict between the provisions of the non-federal and federal laws is the touchstone of preemption.[14] This

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[10]*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 229-230 [67 S.Ct. 1146, 91 L.Ed. 1447]; *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142 [83 S.Ct. 1210, 1217, 10 L.Ed.2d 248].

[11]*Guss v. Utah Labor Relations Board* (1957) 353 U.S. 1, 10-12 [77 S.Ct. 598, 609, 1 L.Ed.2d 601].

[12]*Hines v. Davidowitz* (1941) 312 U.S. 52, 67 [61 S.Ct. 399, 85 L.Ed. 581].

[13]*Rice v. Santa Fe Elevator Corp., supra; Chicago-Midwest Meat Ass'n. v. City of Evanston* (1978) 589 F.2d 278.

[14]*San Diego Unions v. Garmon* (1959) 359 U.S. 236, 250, concurring opinion. [79 S.Ct. 773, 3 L.Ed.2d 775]; *A. M. Motors Sales v. Div. of Motor Vehicles, etc.* (1979) 592 F.2d 219.

Court has rejected previously the notion "that pre-emption is to be inferred merely from the comprehensive character of the federal . . . provisions."[15]

In *New York Dept. of Social Services v. Dublino*, New York's social welfare law was challenged as pre-empted by the 1967 Federal Work Incentive Program provision of the Social Security Act. A three-judge District Court ruled the state law preempted. The Supreme Court reversed stating the general rule thus:

> " 'If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.' [Citations omitted.]"[16]

The Court rejected appellee's contention that the state work programs were preempted because of the comprehensive nature of the federal legislation. The Court then stated:

> "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem, cf. Askew v. American Waterways, 411 U.S. 325 (1973)."[17]
>
> ". . . It would be incongruous for Congress on the one hand to promote work opportunities for

[15]*New York Dept. of Social Services v. Dublino* (1973) 413 U.S. 405, 415, [93 S.Ct. (1973) 2507, 2513].

[16]*Id.*, pp. 413-414.

[17]*Id.*, p. 415.

> AFDC recipients and on the other to prevent States from undertaking supplementary efforts toward this very same end. We cannot interpret federal statutes to negate their own stated purposes."[18]

The Court analyzed the interrelationship of the state and federal efforts as follows:

> "New York, furthermore, has attempted to operate the Work Rules in such a manner as to avoid friction and overlap with WIN. . . . Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."[19]

The zoning ordinance in question would impose a number of operating conditions upon Gulf including, among others, requirements that the operations be sound-proofed, that waste material be deposited in a properly approved site, that no drilling be permitted within 100 feet of any natural water channel, and that all pumps and debris basin be fenced if located in close proximity to a school. These conditions are complementary to the federal regulations requiring environmental protection measures under the Mineral Leasing Act, *supra*. Indeed, the record in this case fails to show that an actual conflict exists between the local ordinance and the federal regulatory scheme. The pre-emption doctrine requires that such a conflict exists before the local ordinance may be preempted.

The leading case involving the invalidity of local regulation of a subject matter said to be occupied

[18]*Id.*, pp. 419-420.

[19]*Id.*, p. 421.

by federal law is *Huron Cement Co. v. Detroit* (1960) 362 U.S. 440.

The issue in that case was whether a municipality in the interests of air pollution reduction could regulate the emissions from boilers on a vessel in interstate commerce when those very vessels had been approved and licensed by the federal government. The Court upheld the city's action stating that:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations omitted.]"[20]

The Court stated the general rule concerning preemption and conflict:

> "In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation *is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field.* In other words, such intent is not to be implied unless the act of Congress fairly interpreted is

[20]*Id.*, p. 442.

> in *actual conflict with the law of the State.*' [Citations omitted.]"[21] (Emphasis added.)

In the present case there is no such actual conflict. The Court of Appeals reasoned that conflict did exist by characterizing the zoning ordinance as a veto power over the project. However, the Court ignored the County's showing that the Planning Commission had successfully applied the zoning ordinance to a number of private lessees in Los Padres National Forest.[22] This evidence indicates without question that Ventura County has issued approximately 13 permits within the last ten years for oil exploration by private operators in Los Padres National Forest.

It is Amici's position that the zoning ordinance in question does not present an actual conflict with federal law. The Planning Commission has neither construed the zoning ordinance to authorize prohibition of a permit to a federal lessee operating in Los Padres National Forest nor indicated an intent to so enforce the ordinance. The allegations in the pleadings and the proffered evidence must be considered. Nowhere in Gulf's pleadings does it appear that the Planning Commission is refusing or has indicated an intention to refuse to issue a permit. Nowhere is it alleged or shown that the Commission has so construed the statute or threatens to do so. The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for a finding of preemption, especially when it does not appear that the local regulation has ever been so con-

[21]*Id.*, at p. 443.

[22]See portion of record reprinted at pp. A-62 through A-72, App.

strued. *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325.

This Court has stressed that the question of preemption requires an analysis between the state and federal laws "not merely as they are written" but "as they are interpreted and applied."[23] Therefore, this Court should analyze the zoning ordinance as written, interpreted and applied. Such an exercise would clearly demonstrate the lack of conflict between the local and federal regulatory scheme.

The Court of Appeals also found the ordinance preempted on the basis that the injunctive relief sought by Ventura County to require compliance by Gulf operated as a veto over the federal lease and thus impermissibly conflicted with federal law. This reasoning, however, is in error because the finding of preemption is not based on the construction of the ordinance as written and applied. Rather, it is based on an extraneous factor—the nature of relief sought by Ventura County to require Gulf Oil to comply. Gulf Oil brought about the circumstances which required Ventura County to file an action to preserve and enforce its rights. To construe Ventura County's enforcement action as an attempt to exercise veto power over Gulf effectively rewards Gulf for not complying with local regulations and operates to limit the County to a declaratory relief action—an action that would not have adequately protected the County's interests.

Further, construing Ventura County's efforts to obtain compliance with its ordinance as tantamount to an exercise of a veto power over Gulf and finding

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[23]*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526 [97 S.Ct. 1305, 51 L.Ed.2d 604].

preemption on that basis is a serious departure from existing precedent on the preemption doctrine which has heretofore required an analysis of the particular regulation in question as written, interpreted and applied. Permitting a finding of preemption to rest on the nature of relief sought by a party would result in rather unclear legal principles. For example, in the instant case, if Ventura County had not initiated an action and Gulf Oil had instead filed an action for declaratory relief, the inquiry would have focused on the ordinance itself and its application. In such a context, the issue that the County sought a veto power through injunctive relief would not have surfaced.

The question of whether or not a particular local government is to be preempted from a field of regulation is of tremendous importance and, therefore, the doctrine of preemption should continue to rest on an analysis of the particular regulation challenged rather than on the vagaries of what party got to court first and the nature of the relief sought.

Further, the Court below has misapplied *Kleppe v. New Mexico, supra,* to Ventura County's zoning ordinance. For the reasons previously indicated herein, the Court has misconstrued the zoning ordinance as a veto power and has rested its analysis on the nature of the relief sought by Ventura County rather than on the nature of the ordinance itself. To so construe the ordinance is to create a conflict where none exists and ignore the ten-year history of the ordinance's successful application to other oil operations in Los Padres National Forest.

In *Kleppe v. New Mexico, supra,* the New Mexico Livestock Board acting pursuant to the State's Estray

Law entered upon the public domain, and removed a number of unbranded burros for subsequent sale. The Bureau of Land Management demanded the return of the burros under the Wild-Free-roaming Horses and Burros Act, 16 U.S.C. sections 1331-1340, enacted to protect wild horses and burros on public lands. New Mexico filed a declaratory relief action seeking a judgment that the federal act was unconstitutional. This Court upheld the constitutionality of the federal law.

The situation in *Kleppe* was different from the case at bar in one substantial respect—the state regulation in *Kleppe* by its terms and application actually conflicted with the federal law. The state regulation permitted conduct which the federal act prohibited. Such is not the case here, where the history of the application of the ordinance has not resulted in a conflict, where the ordinance complements federal environmental protection provisions, and where the ordinance has never been applied in a manner that conflicts with the applicable federal law.

CONCLUSION.

The court below has erroneously construed Ventura County's ordinance and its decision threatens to eliminate the authority of a local government to exercise its police powers on federal land. In the process of invalidating Ventura County's zoning ordinance, the court's holding threatens to disrupt the balance of local and federal authority in the regulation of oil

development on federal lands. For reasons set forth herein, this Court should note probable jurisdiction in this case to review the decision below.

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